

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAVID ROBERTS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. RULE-03-0016

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the Office of the Attorney General, 3501 Colby Avenue, Suite 200, Everett, Washington, on September 15, 2004. On September 24, 2004, Appellant submitted a Post-hearing Brief, and on October 5, 2004, Respondent submitted respondent to Appellant's Post-hearing Brief. BUSSE NUTLEY, Member, reviewed the record, including the recorded proceedings, exhibits and the file, and participated in this decision.

1.2 **Appearances.** Appellant David Roberts was present and was represented Dmitri Iglitzin, of Schwerin, Campbell, Barnard, LLP. Paul M. Garcia, Regional Human Resource Manager, represented Respondent Department of Corrections.

II. FINDINGS OF FACT

2.1 Appellant is a Correctional Officer and a permanent employee of the Department of Corrections (DOC). In May 2003, Appellant suffered an on-the-job injury that caused him to be absent from work.

2.2 On July 24, 2003, Appellant provided a medical note to DOC from his physician that indicated Appellant could return to work for eight hours a day. DOC did not accept the note as a "full release" to work. Mary Ann Sutton, Human Resource Consultant, credibly testified that she and Appellant discussed the doctor's note, and she informed Appellant the department needed clarification regarding how long he would be on overtime restriction.

2.3 On July 30, 2004, the department sent a letter to Appellant's physician requesting further information regarding Appellant's return to work, and specifically requested information regarding whether Appellant was being released to a full duty or light duty position.

2.4 Subsequently, the department received an "injured employee duty status report" dated July 31, and signed by Appellant's physician. The report indicated Appellant could "return to job of injury without restriction. No more than 8 hr work per day."

2.5 The department allowed Appellant to returned to work on August 3, 2003, after receiving a doctor's note that allowed Appellant to return to work without any restrictions. Appellant received no pay from July 22, 2003, through August 2, 2003.

2.6 On August 25, the department's human resource office received a memo from Appellant, in which he wrote:

Above is the note that was provided by a medical professional on July 22, 2003. I was verbally told that this notes was unacceptable by M. Sutton in the HR Depart, after she consulted with R. Riordan on July 22, 2003. The first reason I

1 was given for this note being unacceptable was that this notes didn't release me
2 for a 16 hour shift. ...

3 2.7 On September 10, 2003, Appellant wrote to the department requesting administrative leave
4 with pay for the time period of July 22, 2003 through August 2, 2003, because of the department's
5 rejection of the July 22 doctor's note.

6 2.8 On September 29, 2003, Robert Riordan, Human Resource Manager, responded to
7 Appellant's correspondence, and indicated that his request for administrative leave request would
8 be forwarded to the institution's superintendent for review.

9 2.9 On October 30, 2003, Appellant filed a rule violation appeal, in which he alleged the
10 department violated RCW 41.06.490, WAC 356-46-135, RCW 51.32.060, RCW 51.32.090(3)(a)(ii)
11 and (4)(d), WAC 356-46-020, WAC 356-46-140(6) and WAC 356-46-145. The appeal further
12 indicated:
13

14 My doctor notified my employer and L&I that I had fully recovered from on-the-job
15 injuries and restricted my work to no more than eight hour shift per day temporarily.
16 ... My doctor initially failed to provide a timeframe for restricting my daily work to
17 eight hours (no mandatory overtime), my employer refused to accept this doctor's note
18 without any explanation, ignored my repeated written requests for an explanation why
19 my doctor's note was not acceptable, and then my employer relied on my doctor's
20 omission to prevent me from returning to work.

21 2.10 On September 15, 2004, the Board convened a hearing. At the outset of the hearing,
22 Respondent moved to dismiss the appeal as untimely. Respondent argued the alleged rule violation
23 should have been appealed within 30 days after Appellant became aware of the violation and that in
24 this case, Appellant was aware on July 22, 2003, that his note would not be accepted and he would
25 not be returned to work.

26 2.11 Appellant argues that he was unaware until he received the September 29 letter that the
department would not pay him for the time he was not allowed to work. Appellant asserts that after

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(360) 586-1481

1 his July 22 medical note was not accepted by the department, he made extreme efforts to find out
2 why the note was unacceptable and why the department would not allow him to work.

3 2.12 The Board took the motion under advisement and proceeded to hear the merits of the appeal.
4 During his opening statement, Appellant's counsel argued that the essence of the appeal arose from
5 Respondent's failure to accommodate Appellant's disability when his physician indicated Appellant
6 could return to work for eight hours per day. Appellant argues that the department's refusal to
7 accommodate his disability violated WAC 356-46-020, which prohibits discrimination on basis of
8 disability.

10 IV. CONCLUSIONS OF LAW

11 4.1 The Board may decide an appeal by motion if the documents on file, depositions and
12 affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed
13 as a matter of law. WAC 358-30-060(1). Hall v. University of Washington, PAB No. 3863-V2
14 (1995).

15 4.2 There are no issues of material fact that must be resolved to decide Respondent's Motion to
16 Dismiss. The issue is whether Appellant's appeal was filed within thirty days of the date when he
17 could reasonably be expected to have knowledge of the action giving rise to his appeal. We are
18 able to make this determination based on the uncontroverted facts presented here.

19 4.3 RCW 41.06.170 provides, in relevant part:

20 (2) Any employee who is . . . adversely affected by a violation of the state civil
21 service law . . . shall have the right to appeal to the personnel appeals board
22 created by RCW 41.64.010 not later than thirty days after the effective date of such
23 action. . . .

24 4.4 WAC 358-20-040(1) provides, in relevant part:

1 An appeal must be received in writing at the principal office of the personnel appeals
2 board within 30 days after: . . . (e) the employee could reasonably be expected to
3 have knowledge of the action giving rise to a law or rule violation claim under WAC
4 358-20-020 or the stated effective date of the action, whichever is later.

5 4.5 In this case, Appellant had knowledge of the actions giving rise to this appeal on July 22,
6 2003 when he was informed that he could not return because his doctor's note was unacceptable.
7 Appellant was fully aware, as evidenced by his note to the department, that the reason the
8 department was not returning him to work was because he was restricted to working eight hours per
9 day. Appellant filed this appeal on October 30, 2003, more than thirty days after July 22, 2004.
10 Therefore, even when considering the facts in the light most favorable to Appellant, we must
11 conclude that the appeal was untimely filed, therefore, the appeal should be dismissed.
12 Furthermore, even if Appellant had filed a timely appeal, as provided in WAC 356-46-020,
13 allegations of discrimination are within the jurisdiction of the Washington State Human Rights
14 Commission, not the Personnel Appeals Board.

15 **V. ORDER**

16 NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted,
17 and the appeal of David Roberts is dismissed as untimely.

18
19 DATED this _____ day of _____, 2004.

20
21 WASHINGTON STATE PERSONNEL APPEALS BOARD

22
23 _____
24 Gerald L. Morgen, Vice Chair

25 _____
26 Busse Nutley, Member

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